Original

SUPREME COURT, U.S.
FILED
JAN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1026

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BILL ARMONTROUT, WARDEN
of the Missouri State Penitentiary,

Petitioner,

vs.

FRANK KEVIN POOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

SPRINGFIELD BALDWIN
Attorney appointed for Respondent
Frank Kevin Pool by the United
States Court of Appeals, Eighth
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I.

Whether in a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, a claim of error occurring in prior federal habeas corpus proceedings can serve as a basis for federal habeas corpus relief?

II.

Whether a claim of conspiracy to deny access to the Courts is cognizable in a proceeding for habeas corpus relief under 28 U.S.C. §2254?

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OPINIONS BELOW

See the petition for certiorari, page 1, and the petition's appendix. Later, other references are made to said appendix.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit's order denying both Petitioner's and Respondent's motion for rehearing was issued Sept. 20, 1988 (A1). The Attorneys General of Missouri, acting as attorneys for Bill Armontrout, Warden of the Missouri State Penitentiary, filed a petition for certiorari on the Warden's behalf in this Supreme Court case No. 88-1026. Also, the undersigned attorney, who had been appointed by the United States Court of Appeals for the Eighth Circuit to represent Frank Kevin Pool as his attorney on appeal, filed a petition for certiorari on his behalf in this court in case No. 88-6091 before the Warden's petiton was filed. Both of the petition for certiorari were filed within 90 days of the Court of Appeals' order denying the motions for rehearing in banc. Therefore, the jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

(part of) AMENDMENT VI, U. S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law,nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Court should note that two petitions for certiorari have been filed involving the matters of this case. The one filed by Pool is Supreme Court case No. 88-6091. The one filed by the Missouri Attorneys General on behalf of Warden Armontrout is Supreme Court Case No. 88-1026. Since, this brief is filed in case No. 88-1026, Frank Kevin Pool will be referred to either as Respondent or simply as "Pool".

When Pool was 13 years old he was sent by the St. Louis County, Missouri Juvenile Court to the state mental hospital at Fulton, Missouri. He continued under the supervision of the Juvenile Court and that was his state at the time of the murder in Phelps County. Since, he was under Juvenile Court supervison, he was sent back to said Court. The Phelps County, Missouri Circuit Judge sent Juvenile Judge Ninian Edwards a note that read: "Ninian, we want this boy back".

A Doctor Kessing filed a report in the Juvenile Court stating Pool had a long history of assaultive behavior, and Kissling considered Pool to be "an extremely dangerous individual, and to be in need of confinement and treatment.

The Judge Ninian Edwards found Pool should stand trial as an adult and Pool was returned to Phelps County where he was/was charged with Murder. Apparently, he shot dead a man whom he robbed and who had very little money. This had enraged Pool, as most everything did. While in Phelps County, Pool got into fights with the Sheriff and the jailer. Pool was about sixteen years old.

One Paul Crider was the Phelps County Public defender and he was to represent Pool. He gave the Phelps County Prosecutor, one

Kerry Koboldt, notice that the defense would be not guilty because of mental disease. This meant he would attempt to prove what the Missouri statute required, namely, that Pool was not able to conform his conduct to the requirements of the law at the time of the crime. Crider's motion for a mental examination was granted and Pool was sent to the Missouri mental hospital at Fulton. There he got in more fights and was given the drug thorazine which is recommended to control violent patients. Pool was in maximum security. He was examined by a pyschiatrist, apparently an East-Indian, by the name of Sadashiv Parwatikar, M.D., who offices in St. Louis and apparently drives the 120 miles to Fulton, Mo. to make a few bucks. This doctor has been sued for making a false report by an inmate, but the court dismissed the suit holding him immune. See Moses v. Parwatikar, 813 F.2d 891 (8th Cir.1987).

As for the examination of Pool, Parwatikar reported Pool giggled inappropriately throughout the interview. Pool told the doctor: "I must have been crazy to have my father ~~and tried to stab him~~ tried to stab my father and stab my sister. There is no reason why I do that but our family is rather strange." Dr. Parawatikar would later testify in Pool's post-conviction motion hearing that he did not know for sure whether Pool had been administered thorzine , but the drug would have no effect on the thought processes except to slow them down. (See United States v. Bennett, 460 F.2d 872 (8th Cir. 1972) where the Court held the opposite.) The doctor's report stated Pool believed his attorneys would work against him, and Pool does not seem to be suffering from any mental illness.

Before time came for trial, prosecutor Kerry Koboldt was defeated for election, and Public Defender Crider resigned. The new Public Defender, Terry Daley, then hired the former prosecutor, Koboldt, as an assistant public defender. Since Koboldt had made a deal with Pool companion, Stirrat, to testify against Pool, Koboldt's testimony would have been needed to impeach Stirrat if Stirrat failed to keep the agreement to testify against Pool. This

was
An actual conflict of interest.

Terry Dailey felt that Pool acted normal and so testified at the post-conviction motion hearing under the Missouri Supreme Court's Rule 27.26 proceeding in the trial court. The Public Defender made no effort to interview jailer, friends, doctors, Pool's parents, nor did she make any effort to obtain a separate and independent psychiatric report on Pool. Without effort to further investigate the defense of not guilty by reason of mental disease, the new Public Defender simply pled Pool guilty to the charge of first degree murder, obtaining by plea bargain the reduction of the charge of capital murder which would have been punishable by either death or else by 50 years imprisonment without parole.

In his state post-conviction motion under Missouri's Rule 27.26, Pool would include the attorney's conflict of interest, and allegation of ineffective assistance of counsel under the U. S. Constitution's Sixth Amendment. The post-conviction motion was overruled. As stated, the Missouri Court of Appeals sent the case back so Pool could amend his motion. The case continued pending and after 20 months, the U. S. Court of Appeals for the Eighth Circuit order the District Court to hear a motion by Pool for habeas corpus if the State court did not hear Pool's post-conviction motion in 90 days. (See Pool v. Wyrick, 703 F.2d 1064 [8th Cir.1983].) The state court then heard and overruled Pool's post-conviction motion, and the Missouri Court of Appeals affirmed in Pool v. State, 670 S.W.2d 210 (Mo.App.1984).

In 1981 and 1982 Pool filed petitions in the U. S. District Court for the Eastern District of Missouri, and they were then consolidated. U. S. Magistrate David Noce recommended dismissal and the district court agreed and dismissed Pool's petition. He had alleged claims which included the attorney conflict of interest and the ineffective assistance of counsel claims mentioned above. The dismissal took place May 7, 1985 and it was not until July 7, 1985 (more than 30 days after dismissal) that notice of appeal was

filed. Pool also filed an application for leave to takean untimely appeal and for a certificate of probable cause, all denied by the district court, with the 8th Circuit Court of Appeals affirming.

Pool then filed a motion to vacate the district court's judgment under Federal Rule of Civil Procedure 60(b), alleging prison officials had failed to get his legal mail to him so that he was unaware of the dismissal of his habeas motions. He also sought leave to appeal as a poor person. The court denied leave these motions and the U. S. Supreme Court denied his petitionfor certiorari.

Pool then filed in the instant case, his petition for habeas corpus under Title 28, §2254, alleging in detail how state officials withheld from him the order denying his previous ~~his~~ habeas corpus petition and his Rule 60(b) motion, and to these allegations he attached an affidavit by one Melvin Leroy Tyler, a penitentiary inmate who acts to assist other inmates with their legal problems. Tyler stated he had assisted Pool in his habeas corpus action, that in each of certain other actions Pool had brought timely responses were filed, and that prison officials could have gotten the order denying the habeas to Pool on time but they did not as they had Pool "locked down" and withheld his papers, and Tyler believed that the case of "US EX REL. COOK V. DOWD, 71 S.t. 262, 340 U.S. 206 applied where prison authorities obstructed the ability to file a timely appeal. Pool also realleged the conflict of interest claim. U. S. District Judge William Hungate summarily dismissed Pool's habeas petition, and notice of appeal was timely filed. Judge Hungate granted a certificate of probable cause to appeal and leave to appeal in forma pauperis. The appeal was to the United States Court of Appeals for the Eighth Circuit(herein after referred to as the "8th Circuit").

The Eighth Circuit opinion (See A2-A13) held that Pool's claim that state prison officials interfered with his appeal was a claim that their action had the effect of denying or delaying Pool's release from confinement which is a proper habeas claim (A5). But

the Court also held he was prejudiced by these acts because his other claims had merit and would have been entitled to relief. But if they had no merit there would be no need for an evidentiary hearing to determine whether there was interference by state prison officials.

The Eighth Circuit then held there was no actual conflict of interest (A7), and then after reviewing the record held that Pool's claim of ineffective assistance was a "close one" (A10) but the conduct of Pool's counsel (Public Defender Terry Daley) did not fall below an objective standard of reasonableness, etc. (A11-A12). The 8th Circuit therefore found Pool's claims to be without merit and affirmed the decision of the district court to dismiss Pool's petition for habeas corpus.

As noted above both the Penitentiary Warden, Bill Armontrout, and the prisoner, Frank Kevin Pool, have filed petitions for certiorari in the Supreme Court of the United States. The Warden's case has been docketed as number 88-1026, and Pool's case has been docketed as No.88-6091.

This brief is in answer to the Warden's petition and argues concerning the "Questions Presented" by the Warden's petition. Arguments for "Questions Presented" by Pool are found in his petition.

The undersigned attorney was appointed by the United States Court of Appeals to act as attorney for Frank Kevin Pool on appeal.

ARGUMENT

I

Whether in a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, a claim of error occurring in prior federal habeas corpus proceedings can serve as a basis for federal habeas corpus relief.

While the undersigned attorney for Respondent Pool has not found any Supreme Court cases with facts precisely like this case, the above question presented by the Petitioner Warden is so broadly phrased that the only practical answer to the question must be "yes." Otherwise, the violation of a provision of the United States Constitution which had caused grave injustice which is only brought to light by future developments demonstrating the correctness of a prior claim of error could never be corrected. Further, the "law of the case" has never been held to be an "inexorable rule". The proposition that a prior claim of error could never be a basis for relief could result in grave injustice.

Also, Fed. Rule Civil Procedure 60(b) provides the Court may "relieve a party...from a final judgment, order, or proceeding" for various enumerated reasons, including "(6) any other reason justifying relief from the operation of the judgment". It is obvious the purpose of the rule is to grant courts authority to do justice when the theoretical technicality of "finality" might otherwise prevent it. All the enumerated reasons in Rule 60(b) are reasons to grant relief on prior claims, when the judgments relieved from are contrary to such prior claims.

One also notes in Houston v. Lack, 108 S.Ct. 2379 (1988) that rightly or wrongly the Supreme Court fashioned a remedy for a prisoner whose remedy would otherwise have been defeated by the actual filing in Court of a notice of appeal more than 30 days after district court judgment. Such a rule prejudices no one, and removes a possible cause of great bitterness against Courts which

could otherwise violate justice in the names of the shiboleths of "comity" and "finality", although no doubt some lawyers representing states would feel it is far more important that justices of the Supreme Court violate their oath of office and refuse to enforce the constitution than it is to not make state judges mad which has become the present day main meaning of "comity".

One notes that Respondent Pool sought relief under Rule 60(b) because (according to his allegation) the prison officials had him "locked down", didn't give him his mail, and also because when his inmate legal adviser gave the prison offical papers to mail to the Court the official didn't mail them in a timely manner.

Also, Title 28, §2254 does not place any such limitation on the power of federal courts to hear habeas corpus cases, but on contrary, gives broad general power under the enumerated eight paragraphs of §2254(d) to hear and decide cases falling into the eight enumerated categories.

The undersigned attorney, on behalf of prisoner Pool suggests the time has come to do justice to habeas petitioners who are prevented from appealing by the action of prison officials. Otherwise, on into the future, all a state has to do to prevent habeas corpus appeals is to seclude the prisoner and cut off all information until the time for filing notice of appeals is past. Such a likelihood should be prevented by this Court granting certiorari and allowing the remedy of filing another petition for habeas corpus, or setting forth what the proper remedy should be.

ARGUMENT

II

Whether a claim of conspiracy to deny access to the courts is cognizable in a proceeding for habeas corpus relief under 28 U.S.C. §2254?

The undersigned attorney stands in awe of the convuluted reasoning of the Attorney General's reasoning under this Question. By that reasoning, if a citizen who committed no crime was thrown into jail without trial, then was allowed file a notice of appeal but no other papers, then was allowed to file for habeas corpus, but the prison officials substituted a worthless allegation for what really happened and the petition were overruled, and the prison officials then prevented the filing of an appeal, all the unfortunate citizen would rightfully have would be a civil rights suit!!! And the Supreme Court of the United States would be powerless to grant any remedy at all. And, of course, it follows that the Attorney General, or more properly, his assistant, who no doubt drafted the petition for certiorari, would think it awful if the justices of the Supreme Court honored their oath of office and enforced the constitution. One can only assume that such action by the Court would destroy "comity and federalism".

The preposterous answer to the Question Presented, by the writer of the petition of certiorari, should be ignored by the Court, except that the Court should grant certiorari, give an honest and honorable answer to the question which is consistent with the oath of office of the justices, wherein it could approve the method followed by the United States Court of Appeals for the Eighth Circuit. However, it would then consider Frank Kevin Pool's own petition in case, determining what the duties of any attorney are in investigating whether a defendant in a criminal case is in such mental condition that at the time of the crime he was not able to conform his conduct to the requirements of the law, and

also just how much of a conflict the prisoner's lawyer must have before the conflict is sufficient to warrant another trial with representation by a lawyer who has no conflict. These ideas are taken from Pool's petition for certiorari which is Supreme Court file No. 88-6091, questions of wide spread interest. Supreme Court Rule 17.

The Court of Appeals for the Eighth Circuit did well to devise a method based upon the thought of Preiser v.Rodiguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). Where the 8th Circuit went wrong was in holding Pool's claims without merit. See Pool's petition for certiorari.

CONCLUSION

Respondent Pool, by his undersigned attorney, states that he believes he is entitled to have the Supreme Court issue its writ to the United States Court of Appeals for the Eighth Circuit so that the record may be reviewed, that the Supreme Court should approve a method of procedure applicable to Pool's case whereby prison officials cannot cause writs of habeas corpus to be denied by simply keeping a prisoner in ignorance that a U. S. District Court has denied the writ with the consequence no timely notice of appeal is filed, and Pool believes the issues raised in his own petition for certiorari (Case No.88-6091) have merit and the Court should grant certiorari to review them for all the reasons given above, and for all the reasons given in his own petition.

RESPECTFULLY SUBMITTED UNDER RULE 46,

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CERTIFICATION OF SERVICE

I hereby certify that I, Springfield Baldwin, a member of the bar of the Supreme Court of the United States, did on the 28th day of January, 1989 mail three true copies of a "Respondent's Brief", to William L. Webster, Attorney General of Missouri, John M. Morris III, Assistant Attorney General, and Patrick L. King, Assistant Attorney General of Missouri, the attorneys of record for the Petitioner Warden, Bill Armontrout, and the said three copies were placed in an envelope addressed to the said attorneys at their address of record of P. O. Box 899, Jefferson City, Missouri 65102, and said envelope and copies were mailed to them by pre-paid first class mail by the undersigned by delivering the envelope to an established U. S. Post Office.

Springfield Baldwin

SPRINGFIELD BALDWIN,
attorney for Respondent Frank Kevin Pool, and a member of the bar of the Supreme Court of the United States